Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Metropolitan Police Department,	
Petitioner,	
and	PERB Case No. 10-A-15
	Opinion No. 1294
Fraternal Order of Police/Metropolitan Police Department Labor Committee, (on behalf of John W. Sharps, Jr.),	
Respondent.	

DECISION AND ORDER

I. Statement of the Case:

On February 22, 2010, the District of Columbia Metropolitan Police Department ("MPD", "Department" or Complainant") filed an Arbitration Review Request ("Request") in the above captioned matter. MPD seeks review of an arbitration award ("Award") that sustained the Fraternal Order of Police/Metropolitan Police Department Labor Committee's ("Union", "FOP" or "Respondent") grievance filed on behalf of John W. Sharps, Jr. ("Grievant" or "Mr. Sharps") with MPD.[1] The Arbitrator ruled that MPD violated the collective bargaining agreement ("CBA" or "the Agreement") between the Union and MPD.

The issue before the Board is whether "the arbitrator was without, or exceeded his or her jurisdiction" and whether "the award on its face is contrary to law and public policy." D.C. Code § 1-605.02(6) (2001 ed).

[1] The Union's grievance concerned the June 24, 2005, termination of John W. Sharp's employment.

II. Background

Mr. Sharps was terminated from his employment with the Department as a result of charges of misconduct in Departmental Case Nos. 457-04 and 060-05. Case No. 457-04[2] concerned: (1) the alleged failure to go to a medical appointment – failure to obey orders and

[2] CASE NO. 457-04 Charge No. 1:

> Violation of General Order Series 1202, Number 1, Part 1-B-16, which provides: "Failure to obey orders or directives issued by the Chief of Police." This misconduct is defined as cause in Section 1603 of the D.C. Personnel Manual. Award at 2.
>
> August 12, 2004, you were on Non-POD extended Sick Leave and were to responded [*sic*] to the Medical Services Division on that date. You failed to appear for a follow-up medical appointment. You were AWOL from August 12, 2004, until August 17, 2004, a total of 23 hours.
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> Charge No. 2: Violation of General Order Series 1202, Number 1, part 1-B-16, which provides: "Willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Officer to, or in the presence of any superior officer, or intended for the information of any superior officer, or making an untruthful statement before any court or hearing." This misconduct is defined as cause in Section 1603 of the D.C. Personnel Manual.
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> In that on September 15, 2004, you submitted a written statement wherein you indicated that you failed to keep the scheduled medical appointment on August 12, 2004, because you had to apply for food stamps on that same date. Investigation into this matter revealed that records from the Prince George's County Social Services Department, which was supplied by you, did not indicate a date of August 12, 2004, as the date you were there to apply for food stamps. Therefore, you made a false statement in your written report in violation of the above General Order.
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> Charge No. 3: Violation of General Order Series 1202, Number 1, Part 1-B-8, which provides: "Inefficiency as evidenced by repeated and well founded complaints from superior officers or others concerning the performance of police duty, or the neglect of duty. Three adverse actions within a period of twelve (12) months upon charges involving misconduct as provided in this section shall be prima facie evidence of inefficiency." This misconduct is defined as cause in Title 1, Section 1603 of the D.C. Personnel Manual.
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> In that within a 12 month period, you have had four sustained Adverse Actions against you. Case #030-04, dated March 9,2004, twenty-five (25) days suspension; Case #052-04, dated August 12, 2004, eight (8) days suspension; Case #170-04, dated September 28, 2004, five (5) days suspension; and Case #323-04, dated October 7, 2004, fifteen (15) days suspension. Therefore, you are in violation of General Order Series 1202, Number 1, Part 1-B-8, for Inefficiency.

(Award at pgs. 2-3).

absence without leave on 8/12/2004 to 8/17/2004; (2) that he made a false statement about why he hadn't reported for the 8/12/2004 medical appointment; and (3) that he had received 3 adverse action notices in a 12 month period. As to Case 060-05, MPD charged the Grievant with failure to obey orders and AWOL for not reporting to a medical appointment or rescheduling the appointment.[3]

III. Discussion

A. Arbitrator's Award

The Arbitrator found that the grievant pled guilty to Charge No. 1, Specification No. 1 of Case No. 457-04, and pled not guilty to the remaining charges and specifications. In addition, the grievant challenged all the allegations in Case No. 457-04 on the ground that they violated the 90-day rule. (Award at p. 4). The Department's Adverse Action Board "decided unanimously that termination was the appropriate penalty. In so finding, the Board found the grievant guilty of Charge No. 1, Specification No. 1 of Case No. 457-04; found him not guilty of Charge No. 2, Specification No. 1 of Case No. 457-04; and found him guilty of Charge No. 3, Specification No. 1 of Case No. 457-04. It further found the grievant guilty of Charge No. 1, Specification No. 1 of Case No. 060-05." (Award at p. 4). On May 20, 2005, the grievant appealed the Adverse Action Board's determination to MPD Chief Charles Ramsey. (Award at p. 4). A Final Notice of Adverse Action was issued to the grievant on May 6, 2005, advising him of his removal from the force, effective June 24, 2005. (Award at p. 4). Whereas the Parties were unable to resolve the dispute through the appeal procedure, in accordance with the parties' CBA, the Union invoked arbitration.

The issues before the Arbitrator were as follows:

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[3] CASE NO. 060-05

> Charge No. 1: Violation of General Order Series 1202, Number 1, Part 1-B-16, which provides: "Failure to obey orders or directives issued by the Chief of Police." As further outlined in General Order Series 1001, Number 1, Part H-6 (Medical Services Division) which states, "Failure to appear at the Clinic when scheduled or at a scheduled session at another medical facility or failure to cancel a scheduled appointment on a timely basis shall be handled as a "no-show" for a duty assignment. The member shall be considered to be Absent Without Leave (AWOL) and may be subject to disciplinary action." This misconduct is defined as cause in Section 1603 of the D.C. Personnel Manual.
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> In that on Monday, December 28, 2004, you failed to report to the Medical Services Division for a 1200 hours follow-up behavioral health appointment. Additionally, you failed to reschedule your appointment with a MPD Liaison Official after being instructed to do so by Sergeant James Miller's [*sic*] of the Medical Services Division.

(Award at p. 3).

> (1) Whether the MPD violated the 90-day rule, set forth in District of Columbia Code §5-1031, by its service to the grievant of the Notice of Disciplinary Action;
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> (2) Whether sufficient evidence (the standard under applicable case law being "substantial evidence") existed to support the charges; and
>
> (3) Whether removal was an appropriate penalty.

(Award at p. 5-6).

As to Case No. 457-04, the Arbitrator concluded the remaining charges and specifications against the grievant in Case No. 457-05 must be dismissed "as having been violative of the 90-day rule." (Award at p. 18). Specifically, the Arbitrator noted that that D.C. Code §5-1031(a), in effect since September 30, 2004, referred to as the "90-day" rule, provides, in pertinent part:

> a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department or the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department or the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause.

(Award at p. 9).

The Arbitrator found, based upon the record before him, no "compelling basis for why the delay had to be nearly this long in the first instance. The Final Investigative Report to the Assistant Chief of Police, Office of Professional Responsibility was referred to the DDRO on November 9, 2004. Yet the Notice of Proposed Adverse Action was not issued until March 9, 2005, nearly a full month after the 90-day grace period." (Award at p. 10). The Arbitrator also concluded, that based upon his interpretation of the District of Columbia Court of Appeals' decision in *Finch, et al. v. District of Columbia*, 894 A.2d 419 (D.C. 2006),[4] the 90-day Rule should be applied retroactively to the facts of this case. (Award at pgs. 10-11).

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[4] The Arbitrator summarized the *Finch* case as follows:

> *Finch* involved an MPD officer who, as the MPD found, had engaged in unauthorized outside employment in violation of General Orders, thereafter lying to MPD investigators. The MPD initiated disciplinary action against Finch on October 6, 2004. It was undisputed that the MPD had known of the basis for the discipline for more than ninety days before that date. What was in dispute was the legal impact of the newly-enacted 90-day rule. . . The court in *Finch* did not, however, proceed to endorse the District's apparent argument that "the general presumption against retroactivity of legislation means that no time limit

As to Case No. 060-05, the Arbitrator determined that sufficient evidence did not exist warranting removal and, therefore, termination was not an appropriate penalty. (Award at p. 19).

Based upon the foregoing, the Arbitrator ordered "MPD, as soon as practicable after the issuance of this Opinion and Award, offer the grievant reinstatement to the MPD, and that he be made whole for lost pay, seniority and other benefits, less any statutory benefits and interim earnings." (Award at p. 23).

B. MPD's Arbitration Review Request

The Board has held that when a party files an arbitration review request, the Board's scope of review is extremely narrow.[5] Specifically, the Comprehensive Merit Personnel Act ("CMPA") authorizes the Board to modify or set aside an arbitration award in only three limited circumstances:

1. If "the arbitrator was without, or exceeded his or her jurisdiction";
2. If "the award on its face is contrary to law and public policy"; or
3. If the award "was procured by fraud, collusion or other similar and unlawful means."

D.C. Code § 1-605.02(6) (2001 ed.).

MPD asserts that the Arbitrator's Award is contrary to law and public policy because "the Arbitrator erred in applying the 90-day rule retroactively to cover a period prior to the date the 90-day rule became effective." (Request at 4). The basis for MPD's contention is its disagreement with the Arbitrator's interpretation of *Finch, et al. v. District of Columbia*, 894 A.2d 419 (D.C. 2006). (Request at p. 6).

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whatsoever applies to grounds for discipline known to MPD prior to September 30, 2004," since, in that case, the action against Finch was deemed timely.

(Award at pgs. 11-12).

[5] In addition, Board Rule 538.3 - Basis For Appeal - provides:

> In accordance with D.C. Code Section 1-605.2(6), the only grounds for an appeal of a grievance arbitration award to the Board are the following:
>
> (a) The arbitrator was without authority or exceeded the jurisdiction granted;
> (b) The award on its face is contrary to law and public policy; or
> (c) The award was procured by fraud, collusion or other similar and unlawful means.

The Board's scope of review, particularly concerning the public policy exception, is extremely narrow. Furthermore, the U.S. Court of Appeals, District of Columbia Circuit, observed that "[i]n *W.R. Grace*, the Supreme Court has explained that, in order to provide the basis for an exception, the public policy in question "must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" Obviously, the exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of "public policy." *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 789 F. 2d 1, 8 (D.C. Cir. 1986).[6] A petitioner must demonstrate that the arbitration award "compels" the violation of an explicit, well defined, public policy grounded in law and or legal precedent. See *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). Furthermore, the petitioning party has the burden to specify "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." *MPD and FOP/MPD Labor Committee*, 47 D.C. Reg. 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). See also *District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20*, 34 D.C. Reg. 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987). As the Court of Appeals has stated, we must "not be led astray by our own (or anyone else's) concept of 'public policy' no matter how tempting such a course might be in any particular factual setting." *District of Columbia Department of Corrections v. Teamsters Union Local 246*, 54 A2d 319, 325 (D.C. 1989).

We find that MPD has not cited any specific law or public policy that was violated by the Arbitrator's Award. We decline MPD's request that we substitute the Board's judgment for the arbitrator's decision for which the parties bargained. MPD had the burden to specify "applicable law and public policy that mandates that the Arbitrator arrive at a different result." *MPD and FOP/MPD Labor Committee*, 47 D.C. Reg. 717, Slip Op No. 633 at p. 2, PERB Case No. 00-A-04 (2000). Instead MPD repeats the same arguments considered and rejected by the Arbitrator; this time asserting that the Arbitrator misinterpreted the Court of Appeals' *Finch* decision.

We have held that a disagreement with the Arbitrator's interpretation does not render an award contrary to law. See *DCPS and Teamsters Local Union No. 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO*, 49 D.C. Reg. 4351, Slip Op. No. 423, PERB Case No. 95-A-06 (2002). Here, the parties submitted their dispute to the Arbitrator. MPD's disagreement with the Arbitrator's findings and conclusions is not a ground for reversing the Arbitrator's Award. See *University of the District of Columbia and UDC Faculty Association*, 38 D.C. Reg. 5024, Slip Op. No. 276, PERB Case No. 91-A-02 (1991). As a result, the Board declines to reverse the Arbitrator's Award based upon this allegation.

MPD's next contention is that the "Arbitrator's finding that there was insufficient evidence to support Case No. 0060-05 based upon General Order 1001.1 (H) (6) (GO or General Order) being inapplicable must be rejected." (Request at p. 6). Specifically, MPD argues that

[6] See *W.R. Grace & Co. v. Local Union 759, International Union of United Rubber Workers*, 461 U.S. 757, 103 S. Ct. 2177, 2176, 76 L. Ed. 2d 298 (1983).

the "Arbitrator's determination that the GO is inapplicable to the Grievant is not supported by the plain language of the GO. Therefore, the AA must be rejected because it is contrary to law." (Request at p. 7).

As stated above, mere disagreement with an Arbitrator's interpretation of a law (or in the present case – Departmental Order 1001.1 (H) (6)) does not render an award contrary to law. *DCPS*, Slip Op. No. 423. Consequently, this argument is similarly rejected.

Lastly, MPD contends that the Arbitrator has exceeded his jurisdiction by considering an argument that was not previously presented to the Chief of Police on appeal. (Request at p. 8). The basis for this contention relies on MPD's argument that the grievant failed to precisely assert the argument that there was a lack of evidence to support the charge in Case 060-05. This argument, however, was also considered and rejected by the Arbitrator. In addition, MPD merely disagrees with the Arbitrator's findings and conclusions.

We have held and the District of Columbia Superior Court has affirmed that, "[i]t is not for [this Board] or a reviewing court . . . to substitute their view for the proper interpretation of the terms used in the [CBA]." *District of Columbia General Hospital v. Public Employee Relations Board*, No. 9-92 (D.C. Super Ct. May 24, 1993). See also, United *Paperworkers Int'l Union AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). We have explained that:

> [by] submitting a matter to arbitration "the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement, related rules and regulations, as well as the evidentiary findings and conclusions on which the decision is based."

District of Columbia Metropolitan Police Department v. Fraternal Order of Police/ Metropolitan Police Department Labor Committee, 47 D.C. Reg. 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000); *D.C. Metropolitan Police Department and Fraternal of Police, Metropolitan Police Department Labor Committee (Grievance of Angela Fisher)*, 51 D.C. Reg. 4173, Slip Op. No. 738, PERB Case No. 02-A-07 (2004). In the present case, the Board finds that MPD's arguments are a repetition of the positions it presented to the Arbitrator and its ground for review only involves a disagreement with the Arbitrator's interpretation of General Order 1001.1 (H) (6). MPD merely requests that we adopt its interpretation and factual assertions. This we will not do.

Moreover, the Board has held, as has the Court of Appeals for the Sixth Circuit, that questions of procedural aberration, asking whether: (1) the arbitrator acted outside his authority by resolving a dispute not committed to arbitration; (2) the arbitrator committed fraud, had a conflict of interest, or otherwise acted dishonestly in issuing the award; and (4) the arbitrator, in resolving any legal or factual disputes in the case, was arguably construing or applying the contract; so long as the arbitrator does not offend any of these requirements, the request for judicial intervention should be resisted even though the arbitrator made serious, improvident, or silly errors in resolving the merits of the dispute. See *Michigan Family Resources, Inc. v. Service Employees International Union, Local 517M*, 475 F. 3d 746, 753 (2007) (overruling

Cement Divisions, Nat. Gypsum Co. (Huron) v. United Steelworkers of America, AFL-CIO-CLC, Local 135, 793 F.2d 759).

In light of the above, the Board finds that there is no claim that the arbitrator acted outside his authority by resolving a dispute not committed to arbitration, committed fraud, had a conflict of interest, or otherwise acted dishonestly in issuing the award. The Board finds that here, the Arbitrator, in resolving any legal or factual disputes in the case, was arguably construing or applying the contract. Therefore, the Board rejects MPD's argument that the Arbitrator exceeded his authority or acted outside his jurisdiction in resolving the grievance before him.

In view of the above, we find no merit to MPD's arguments. We find that the Arbitrator's conclusions are based on a thorough analysis and cannot be said to be clearly erroneous, contrary to law or public policy, or in excess of his authority under the parties' CBA. Therefore, no statutory basis exists for setting aside the Award.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Metropolitan Police Department's Arbitration Review Request is denied.

2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

April 24, 2012

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 10-A-15, Slip Opinion No. 1294 was transmitted via U.S. Mail and e-mail to the following parties on this the 13th day of July, 2012.

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